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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TULARE, VISALIA DIVISION

In re SEARCH WARRANT NO. 013487 EXECUTED AUGUST 22, 2018 AT JPMORGAN CHASE BANK

YORAI BENZEEVI,

Moving Party,

v.

SUPERIOR COURT OF THE COUNTY OF TULARE

Respondent,

TULARE COUNTY DISTRICT ATTORNEY'S OFFICE,

Real Party in Interest.

Case No.

NOTICE OF MOTION AND MOTION OF DR. YORAI BENZEEVI FOR RETURN OF SEIZED PROPERTY AND RELATED EVIDENTIARY HEARING; MEMORANDUM IN SUPPORT

Date: October 5, 2018
Time: 2:00 p.m.
Dept.: 13
Judge: Hon. John P. Bianco

PUBLIC – Redacts Materials from Conditionally Sealed Record

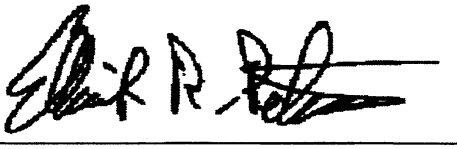
NOTICE OF MOTION

PLEASE TAKE NOTICE that on October 5, 2018 at 2:00 p.m., or as soon thereafter as this matter may be heard in Department 13 of the above-entitled Court located at 221 S. Mooney Boulevard, Visalia, California 93291, Dr. Yorai Benzeevi will move this Court for return of seized property and a related evidentiary hearing in this case.

This motion is based upon this Notice, the Memorandum of Points and Authorities in Support thereof, the Declarations of J. Duross O'Bryan and Bevan A. Dowd, the complete files and records in this action, such other evidence as may be allowed, and any argument of counsel at the hearing of this motion.

Dated: September 20, 2018

KEKER, VAN NEST & PETERS LLP

By: 

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I. INTRODUCTION

On August 22, 2018, the Tulare County District Attorney ("the State") seized [redacted] from bank accounts belonging to Dr. Yorai Benzeevi and his company, Healthcare Conglomerates Associates, LLC ("HCCA"). The State claims that this seizure is justified because Dr. Benzeevi supposedly stole proceeds of the August 2017 Celtic loan, which was a loan to the Tulare Local Healthcare District ("the District") while HCCA was its manager. The State's position does not withstand constitutional or statutory scrutiny.

Dr. Benzeevi moves this Court for return of his seized and frozen personal bank account because the warrant authorizing the search is not supported by probable cause. First, no crime has been committed—the District's Board of Directors authorized each of HCCA's allegedly wrongful acts, either by Board-approved Resolution or contract. Second, the State cannot show that the seized money is ***the same money*** that was disbursed one year earlier through the Celtic loan, a legitimate and lawfully authorized loan necessary to keep the hospital doors open. Third, the State's continued refusal to release these funds unconstitutionally interferes with Dr. Benzeevi's Sixth Amendment right to counsel. Each of these grounds is sufficient to order release of these funds.

Dr. Benzeevi has a due-process right to a hearing regarding the return of his improperly seized property. At that hearing, the State bears the burden of proving to this Court that the property was appropriately seized pursuant to California Penal Code § 1524 as evidence or proceeds of a crime. Because the State cannot—and will not—make this showing, Dr. Benzeevi's property must be returned to him.

II. FACTS AND RELEVANT PROCEDURAL HISTORY

A. Under HCCA's management, the Tulare Local Healthcare District avoids financial collapse.

Dr. Benzeevi, a board-certified emergency physician and Fellow of the American College of Emergency Medicine, founded HCCA to help manage hospitals. Dowd Decl., Ex. 1 ¶ 1[1] [Benzeevi Decl i/s/o HCCA's Opposition to Motion for Authorization to Reject Executory

[1] "O'Bryan Decl." refers to the Declaration of J. Duross O'Bryan in support of this Motion. "Dowd Decl." refers to the Declaration of Bevan A. Dowd in support of this Motion.

Contract]. In May 2014, HCCA entered into a Management Services Agreement ("MSA") with Tulare Local Healthcare District (the "District").[2] Dowd Decl., Ex. 2 [MSA]. Under this agreement, HCCA undertook full operational responsibility for the District's facilities, including its acute care hospital and clinics. *Id.* at ¶ 3(a). This included administering finances, employing all hospital personnel, purchasing equipment, expanding facilities and services, and supervising day-to-day operations. *Id.* In exchange, HCCA received a monthly management fee and an employee lease payment. *Id.* at ¶¶ 4(b)(ix), 6. Former District Board Director Linda Wilbourn has described "the unique partnership between the District and HCCA [as] an innovative solution to the success of [the] hospital." *Id.* Ex. 4 [Wilbourn Resignation letter].

The financial turnaround under HCCA was striking. The District had a long history of ineffective management, losses, and internal disputes with physicians who sought excessive compensation. *Id.*, Ex. 1, ¶ 7. In the two years prior to engaging HCCA, the District received a "Going Concern" disclosure from its independent auditors, meaning that the auditors were uncertain that the District would survive the year. O'Bryan Decl., ¶ 9(c). The District also received a "negative" outlook rating from Moody's, the credit rating agency. *Id.*, ¶ 9(d). After HCCA was engaged, the District's consistent operating losses turned into profits within three months; the auditors no longer issued a "Going Concern" disclosure; and Moody's upgraded its rating to "stable." *Id.*, ¶¶ 9(c)-9(d). Moody's credited the new management for the District's turnaround. *Id.*

B. To address a cash shortfall, the District passes Resolution 852, authorizing HCCA to borrow money on its behalf.

In 2016, the District faced an abrupt and unfortunate increase in accounts receivable (*i.e.*, unpaid bills) that corresponded to its transition to a new medical records software system, provided by Cerner Corporation. O'Bryan Decl., ¶ 10. This problem was not unique to the District; many hospitals had difficult transitions with the Cerner system. Dowd Decl., ¶ 5 [articles]. The bumpy transition created a cash shortfall for the District. The District became

[2] In January 2014, HCCA began working with the District pursuant to a short-term Management Services Agreement. *See* Dowd Decl., Ex. 3 [Amendment to Interim Agreement].

indebted to HCCA for management fees and operating capital, and HCCA had to loan money to the District to make payroll. O'Bryan Decl., ¶ 11. (This was not a new occurrence—HCCA loaned over $10 million to the District over the years. *Id.*)

On June 20, 2017, in response to its cash shortfall, the District passed Resolution 852, which authorized HCCA to borrow up to $22 million on behalf of the District. Dowd Decl., Ex. 6 [Res. 852]. Resolution 852 further authorized HCCA to use any District property as needed to secure the loans. *Id.* This resolution allowed HCCA to obtain funding so that it could keep the hospital open, the employees paid, and the patients treated. *Id.* HCCA pursued a $3 million loan from Celtic Leasing Corporation ("Celtic").

C. Two District Board members and one Board member-to-be hold unofficial meetings where they purport to rescind Resolution 852.

In a July 11, 2017 special election, voters in District Three of the Tulare hospital district recalled a long-time member of the Board Directors, Dr. Parmod Kumar, and replaced him with Senovia Gutierrez. While Ms. Gutierrez was elected, she was not yet seated as an official, voting Director because the District Board had not made the statutory declaration of the election result to officially seat Ms. Gutierrez pursuant to Election Code section 15400. Dowd Decl., Ex. 7 ¶ 10(f) [Gutierrez Compl.] At the July 26, 2017 Board meeting—the first regularly scheduled Board meeting after Ms. Gutierrez's election, the Board did not declare the results of the election, nor did it seat Ms. Gutierrez, based on concerns about violating the Brown Act and the lack of a quorum. Dowd Decl., Ex. 7 ¶ 10(f) [Gutierrez Compl.], Ex. 8 [Sept 11, 2017 State Writ] at 4, Ex. 9¶ 4 [Jamaica Decl i/s/o Ex Part App for TRO and Prelim Inj].

On July 27, 2017, three individuals—Board Directors Kevin Northcraft and Michael Jamaica and the yet-to-be-seated Ms. Gutierrez ("the Dissenting Board")—purported to notice and conduct a Board meeting at which they purported to rescind Resolution 852. *Id.*, Ex. 7 ¶ 10(g)–(h) [Gutierrez Compl.], Ex. 10 [7/27/2017 Mtg. Minutes]. That meeting lacked a quorum because it involved only two seated Directors, and it lacked adequate notice under the Brown Act, both because there was at most one day's notice of the meeting and because the Dissenting Board lacked authority to notice any meeting. The Dissenting Board held other meetings and took other

actions as well. But Ms. Gutierrez acknowledges that the Board at that time did not recognize that she had any "right to vote at a regular Board meeting" because she had not yet been formally declared as a Board Member. *Id.* Ex. 7 ¶ 16(b) [Gutierrez complaint]; *see also* Cal. Elec. Code § 15400. As a result and as discussed below, none of the Dissenting Board's actions were legally binding on the District.

As the Dissenting Board conducted these unofficial meetings, HCCA had a hospital to run. It continued to pursue the Celtic loan pursuant to Resolution 852.

But prior to proceeding with the Celtic loan, Dr. Benzeevi learned from multiple lawyers that Ms. Gutierrez had not been seated, that the Dissenting Board's actions lacked legal authority, and that Resolution 852 was still in effect. The District's law firm, Baker Hostetler LLP, a national law firm, and an independent election lawyer, Michael Allan, both verified that Resolution 852 remained in force and effect at the time of the Celtic loan. *See* Dowd Decl., Exs. 11-13 [August 25 Opinion Ltr.; 7/26/2017 B. Greene email; 7/28/2017 B. Greene email]. Moreover, the Baker Hostetler lawyer wrote two emails in July to the Board advising it of his opinion that Ms. Gutierrez was not an authorized Board Member. *Id.*, Ex. 12 [7/26/2017 B. Greene email], Ex. 13 7/28/2016 B. Greene email]; *see also id.*, Ex. 8 at 4 (recognizing that Board Chair Wilbourn "rel[ied] on the advice of then Board counsel Bruce Greene" in refusing to declare Ms. Gutierrez a Board Member), Ex. 5 (reproducing Mr. Greene's legal recommendation to the Board Members that Ms. Gutierrez was not yet a Board member) [Sept 11, 2017 Petition for Alternative Writ], Ex. 7 ¶ 10(i) (discussing Mr. Greene's opinion that Ms. Gutierrez was not a Board member as of August 9, 2017) [Gutierrez Compl], Ex. 9 ¶¶ 6-7 (describing Baker Hostetler's advice that Ms. Gutierrez was not an authorized member of the Board). [Jamaica Decl i/s/o Ex Part App for TRO and Prelim Inj]. Additionally, on August 25, 2017, Baker Hostetler, LLP, requested and received an opinion letter from attorney Michael L. Allan as to whether the rescission of Resolution 852 was effective. Dowd Decl., Ex.11 [August 25 Opinion Ltr.]. Mr. Allan advised that the rescission of Resolution 852 was not effective. *Id.* HCCA and Celtic both relied on Mr. Allan's opinion to finalize the Celtic loan. Celtic delivered the $3 million in loan proceeds to the District on August 31, 2017. O'Bryan Decl., ¶ 27. Per the MSA,

the District authorized HCCA to use District funds—such as the Celtic loan proceeds—to repay HCCA's outstanding loans and fees.

At the time of the Celtic loan, the District owed HCCA over $2.5 million in unpaid management fees and employee lease payments. O'Bryan Decl., ¶ 28. Two provisions in the MSA authorized HCCA to use District funds to pay HCCA's fees: 1) section 6(f)(i) ("Manager [HCCA] has the right from time to time to setoff any amounts owed by the District to Manager . . .from any funds of the District over which Manager has . . . a right of disbursement") and 2) section 4(g)(v) ("Manager is hereby authorized to make payment from the Master Account or other accounts of the District to itself . . . [for] any amounts due to it . . . by the District under this Agreement or otherwise"). Dowd Decl., Ex. 2 [MSA] at 30, 16. Of the $3 million in Celtic loan proceeds, HCCA used approximately $500K to pay the District's legal fees and approximately $2.4 million to pay HCCA's outstanding loans. O'Bryan Decl., ¶ 28. Of the $2.4 million paid to HCCA, HCCA loaned $400,000 back to the District to cover then-current payroll expenses. *Id.*, ¶ 30. Even after these payments, at the termination of the MSA, the District still owed HCCA more than $1.2 million in unpaid loans as expressly authorized by the MSA. *Id.*, ¶ 25.

D. Both the State and Ms. Gutierrez file lawsuits seeking to compel the Board to seat Ms. Gutierrez as a valid Board member.

On September 11, 2017, the State—represented by Assistant District Attorney Trevor Holly, the same prosecutor pursuing this criminal investigation against Dr. Benzeevi[3]—filed a civil Petition for Alternative Writ of Mandate under California Code of Civil Procedure § 1085(a) and a Petition for Quo Warranto, seeking to compel the Board to recognize Ms. Gutierrez as a Board member.[4] Dowd Decl., Ex. 8 [Sept 11, 2017 State Writ], Ex. 14 [Petition for Quo Warranto]. This action acknowledged that Ms. Gutierrez was not formally seated in office, asserting that the sitting Board had "den[ied] and delay[ed] Ms. Gutierrez [from] her

[3] The State and Ms. Gutierrez were represented by independent counsel in this action.

[4] The State also brought a Notice of Application For Leave To Sue In Quo Warranto and an Ex Parte Application For Temporary Restraining Order and Order to Show Cause re Preliminary Injunction, seeking the same relief as the Petition for Alternative Writ of Mandate. Dowd Decl., Ex. 14 [Petition for Quo Warranto], Ex. 15 [Ex Parte Application for TRO].

seat, . . . den[ying Ms. Gutierrez] the right to her elected office." Dowd Decl., Ex. 8 at 3 [Sept 11, 2017 State Writ]. Judge Melinda Reed, who presided over the matter, denied this writ and other petitions brought by the State because the State failed to name the District as a party and failed to obtain the Attorney General's permission to file a quo warranto petition. *Id.*, Ex. 16 at 32:25–33:16. Judge Reed also indicated that, at most, the limit of the Court's authority would be to "direct[] the Board to have a properly noticed meeting to carry out the mandate of election Code Section 15400"—but she declined to make even that ruling. *See id.* at 7:22 – 8:1. Critically, Judge Reed agreed that the board meetings held by the Dissenting Board were "not necessarily valid" because the "necessary declaration" under section 15400 had not occurred *Id.*at 23:10-14.

On September 27, 2017, Ms. Gutierrez filed a lawsuit in the Superior Court of California in and for the County of Tulare, seeking declaratory and injunctive relief regarding her election as a Board member for Area 3. *See generally* Dowd Decl., Ex. 7 [Gutierrez Compl.]. Her complaint acknowledged that she was not yet an authorized Board Member because the Board "refused to declare [her] as a Board Member" on July 27, 2017 as required by California Elections Code § 15400. *See id.*, Ex. 7 ¶¶ 12, 21.

E. The Board rescinds Resolution 852 in September 2017.

Also on September 27, 2017—weeks after the execution and disbursement of the Celtic loan—the District Board finally declared Ms. Gutierrez's election. Dowd Decl., Ex. 17 [9/27/17 Meeting Agenda]. Because the purported Board actions of Ms. Gutierrez and Directors Northcraft and Jamaica during the prior two months lacked legitimacy, the duly seated board proceeded to ratify those actions on September 27, 2017. *Id.* Thus, it was not until September 27, 2017 that the Board lawfully rescinded Resolution 852. By this time, HCCA had already received proceeds from Celtic and paid valid and overdue District debts to HCCA for payroll loans and other valid past due debts.

F. Eleven months later, the District Attorney seizes and freezes Dr. Benzeevi and HCCA's accounts.

On August 22, 2018—nearly one year after Celtic delivered the $3 million in loan proceeds—the District Attorney's Office obtained a search warrant to freeze three HCCA bank

accounts as well as Dr. Benzeevi's primary personal account. Dowd Decl., Ex.18 [Chase Warrant]. Although the affidavit supporting the search remains under seal, the District Attorney has indicated to counsel that the basis for the search warrant was that HCCA and Dr. Benzeevi improperly received Celtic loan proceeds. Neither Chase Bank nor the State has provided HCCA or Dr. Benzeevi the declarations and documentation underlying the "search warrant" for the subject bank accounts.[5] Pursuant to the search warrant, Chase Bank froze over [redacted] from Benzeevi's primary personal account [redacted] O'Bryan Decl., ¶ 29.

But because this account had other money in it before the Celtic loan proceeds were deposited and because there were numerous transactions in and out of the account over the last year, it is not possible reasonably to conclude that the funds frozen in August 2018 were proceeds of the Celtic loan. *Id.* ¶ 31. [redacted] *Id.* ¶ 29. [redacted] *Id.* ¶ 33(a), Attachment 12. Given this history, J. Duross O'Bryan—a qualified expert forensic accountant—has found that there is no reasonable basis to conclude that the approximately [redacted] contains any Celtic loan proceeds. *Id.* ¶ 35.

III. LAW AND ARGUMENT

The State's seizure of Dr. Benzeevi's bank account offends California law, the Fourth Amendment protection against unreasonable searches and seizures, and the Sixth Amendment right to counsel of one's choice. *See* U.S. Const. amends. IV, VI.

Because the MSA and the Board authorized HCCA to use the Celtic loan to pay outstanding fees and loans, Dr. Benzeevi's use of those funds for that purpose cannot be a crime. Moreover, the State cannot show that the money in the [redacted] is the *same money* that Dr. Benzeevi received from the Celtic loan, as required by Penal Code § 1524. That account included funds indisputably unrelated to the Celtic loan, and dozens of lawful transactions caused money

[5] Movants have previously moved for unsealing of these affidavits and reiterate that motion here. That motion is set for hearing on October 5, 2018.

to move into and out of that account during the last year. Finally, the State's seizure of Dr. Benzeevi's assets interferes with his right to counsel of choice and is prohibited under the Sixth Amendment. *See Luis v. United States*, 136 S. Ct. 1083, 1089 (2016) (plurality opinion).

The Court should grant Dr. Benzeevi's motion for return of seized property.

A. No crime was committed because the Board and the MSA approved Dr. Benzeevi's use of the Celtic loan.

A duly-authorized District Board empowered Dr. Benzeevi and HCCA to seek external financing that could be used to continue hospital operations and repay debt. The MSA authorized Dr. Benzeevi to use those funds to repay debts to HCCA. Because the Board approved the use of funds at every step, there was no crime. For this reason, the warrant lacked probable cause.

1. HCCA received authorization for the Celtic loan in June 2017, and that authorization was not revoked until September 27, 2017.

The sitting Board enacted Resolution 852 in June 2017—three weeks before the recall election of Dr. Kumar—thereby authorizing HCCA to seek up to $22 million in loans. Dowd Decl, Ex. 6 [Res. 852]. Because Resolution 852 empowered HCCA to use the loans for, among other things, "operating expenses [and] repayment of debt," HCCA executed the Celtic loan with Board authorization on August 24, 2017 and used the proceeds for authorized purposes weeks before the Board validly rescinded Resolution 852. Dowd Decl., Exs. 6, 19 [Res. 852], [Celtic acceptance of the leaseback loan agreement].

Critically, the Dissenting Board's earlier attempt to rescind Resolution 852 on July 27, 2017 had no legal effect because Ms. Gutierrez was not properly seated as a Board Director until September 2017, and as a result, the Dissenting Board lacked a quorum. Under California Elections Code § 15400, the Board must "declare elected . . . the person having the highest number of votes for that office." Until such a declaration happens, an elected candidate does not wield the power of the elected office.[6] As Ms. Gutierrez recognizes, the Board did not make the

[6] Other local government boards recognize this precept expressly. *See* County of Sonoma Agenda Item Summary Report, 12/14/2010, available at http://sonoma-county.granicus.com/MetaViewer.php?view_id=2&clip_id=131&meta_id=43484 (stating that without a resolution under § 15400, "elected candidates [would] not tak[e] office").

§ 15400 declaration on July 26, at least because no meeting occurred on that date.[7] Dowd Decl., Ex 7¶ 10(f) [Gutierrez Complaint], Ex. 10 [Meeting Minutes]. As a result, the Dissenting Board had only two seated Directors on July 27, 2017 when they purported to rescind Resolution 852. But the District bylaws provide that only two Directors cannot bind the District because there must be a quorum to take formal action.[8] Dowd Decl., Ex 20 at Article II, Section 2.a [District Bylaws]. Indeed, without a quorum, the Dissenting Board could not even validly notice or conduct the meeting. Accordingly, the July 27, 2017 rescission of Resolution of 852 was ineffective.

The multiple desperate after-the-fact efforts to ratify the actions of the Dissenting Board confirm the illegitimacy of those actions. First, Ms. Gutierrez—and the District Attorney—sued the District to obtain a declaration that Ms. Gutierrez "was authorized to take all actions as the Area 3 Board Member as of July 25, 2017." *Id.*, Ex. 7 at 14 [Gutierrez Compl.] But the Court declined to so rule, thus confirming that Resolution 852 was not validly rescinded. *See id.*, Ex. 16 32:25–33:16. Second, on September 27, 2017, the District Board finally declared "Senovia Gutierrez as a Board Member pursuant to Elections Code section 15400." This action proves that Ms. Gutierrez was not a seated board member when she acted as part of the Dissenting Board to rescind Resolution 852. Third, on September 27, 2017, the Board ratified the rescission of Resolution 852—a clear recognition that Resolution 852 remained in effect until that time. But this untimely rescission of Resolution 852 occurred weeks after the August 31, 2017 Celtic loan was disbursed. Accordingly, the Dissenting Boards attempt to rescind Resolution 852 had no legal effect until September 27, 2017, well after the August 31, 2017 Celtic loan was executed.

Moreover, Dr. Benzeevi, as an executive officer for the District, received numerous legal

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[7] And the Board could not have made this declaration, because there was no quorum present for a meeting, nor did it have a formal motion or resolution on its July 26 agenda. Dowd Decl., Ex. 20 [District Bylaw, Article II, Section 2.c.]. Indeed, even if a quorum had been present, an impromptu resolution at the July 26 meeting would have violated the Brown Act. *See* Cal. Gov't Code § 54954(a) (requiring legislative bodies to provide "the time and place for holding regular meetings . . . for which an agenda is posted at least 72 hours in advance").

[8] Moreover, the Dissenting Board's July 27, 2017 meeting was not properly noticed under the Brown Act. *See* Cal. Gov't Code § 54954(a) (requiring 72 hours' notice prior to regular meetings).

opinions from the Baker Hostetler law firm and a separate election lawyer, Michael Allan, verifying that Resolution 852 remained in force and effect at the time of the Celtic loan. *See* Dowd Decl., Exs. 11-13 [August 25 opinion letter; 7/26/2017 B. Greene email; 7/28/2017 B. Greene email]. Dr. Benzeevi had trusted and relied upon the Baker Hostetler firm for years and was justified in relying on their legal advice as District counsel. Moreover, the State and Ms. Gutierrez recognize that the District's counsel advised repeatedly that Ms. Gutierrez was not appropriately seated on the Board.[9] Under these circumstances the State cannot establish probable cause that any of the crimes enumerated in the warrant were committed, as there is an overwhelming absence of any criminal intent to believe that Resolution 852 was validly rescinded.

2. The MSA empowered Dr. Benzeevi to remove funds from the Tulare Asset Management Account to pay "any amounts due" to HCCA.

After HCCA received the Celtic loan, Dr. Benzeevi was authorized to move the money into HCCA's accounts and from those accounts to his personal [redacted]. Indeed, under the terms of the MSA—which the Board approved in 2014—the District owed HCCA millions in unpaid fees and loans, a portion of which the Celtic loan helped to offset.

The MSA provides various protections to HCCA that guaranteed the company would receive payment for its outstanding fees and loans. Section 4(g)(iii) mandates that "[t]he District shall provide disposition instructions to the Depository to transfer, at the end of each business day during the Operating Period, . . . all amounts in the Depository Account . . . into a bank account controlled by [HCCA] [redacted]." HCCA could then transfer money in the [redacted] to itself to pay outstanding receivables, including from the District. Dowd, Ex. 2 [MSA] at § 4(g)(v) (authorizing HCCA to transfer funds from the [redacted] or other District accounts "to [HCCA] and its Affiliates of any amounts due to it"). And § 6(f)(i) of the MSA

[9] Dowd Decl., Ex. 8 at 4 (recognizing that Board Chair Wilbourn "rel[ied] on the advice of then Board counsel Bruce Greene" in refusing to declare Ms. Gutierrez a Board Member), Ex. 5 (reproducing Mr. Greene's legal recommendation to the Board Members that Ms. Gutierrez was not yet a Board member), [Sept 11, 2017 Petition for Alternative Writ], Ex. 7 ¶ 10(i) (discussing Mr. Greene's opinion that Ms. Gutierrez was not a Board member as of August 9, 2017) [Gutierrez Compl], Ex. 9 ¶¶ 4 [Jamaica Decl i/s/o Ex Part App for TRO and Prelim Inj].

gave HCCA "the right from time to time to setoff any amounts owed by the District to [HCCA] . . . from any funds of the District over which [it] ha[d] . . . a right of disbursement." Dowd Dec., Ex. 2 [MSA]. Pursuant to this authority, HCCA transferred Celtic loan proceeds to the [redacted]; from the [redacted] to an HCCA account; and Dr. Benzeevi had a right to transfer the money to any account, including his personal account. O'Bryan Decl., ¶ 27. HCCA used approximately $500,000 for third-party attorneys' fees, and $2.4 million to pay outstanding HCCA loans, of which HCCA loaned $400,000 back to the District to cover employee payroll expenses. *Id.*, ¶ 28. Because the MSA authorized HCCA to make payments "of any amounts due to it," the net $2 million that HCCA received was appropriately used to pay down the District's outstanding loans to HCCA.[10]

Because the Board and the MSA authorized his actions, Dr. Benzeevi did not commit a crime in transferring a portion of the Celtic loan he was legitimately owed to the [redacted].[11]

B. The Chase Warrant lacks probable cause because the State cannot show that the seized assets are proceeds of the Celtic loan.

Under California Penal Code § 1524, a warrant may be issued for "property [that] was stolen or embezzled [or] when the property or things seized . . . constitute evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony." To comply with the Fourth Amendment, a warrant must be supported by an affidavit establishing probable cause; that is, the affidavit must show "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *see also People v. Hale*, 133 Cal. App. 4th 942, 945 (2005) (same). The judge issuing the search warrant must have a "substantial basis" to conclude that probable cause exists. *Gates*, 462

[10] After these payments, the District still owed HCCA more than $1.2 million in unpaid fees as dictated by the MSA. O'Bryan Decl. ¶ 25.

[11] Moreover, the crimes that the State lists in the Chase Warrant have elements related to and requiring *mens rea* and/or acting without authority. *E.g.*, Cal. Penal Code § 511 (stating that, upon an indictment for embezzlement, "it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable"). The State cannot satisfy these elements where the Board authorized the Celtic loan, the Celtic loan was not rescinded until late September 2017, the MSA authorized Dr. Benzeevi to pay himself for outstanding fees and loans, and Dr. Benzeevi was acting on advice of counsel for the District.

U.S. at 238–39. Because it cannot show that these funds are stolen property, the State cannot establish that there was probable cause to seize the [redacted].[12]

The seized funds are not "property that was stolen," contrary to what is required to issue a warrant under § 1524. Here, the "plain, commonsense meaning" of this provision is clear: § 1524 limits the State to seizing only the property that was, in fact, stolen. *See People v. Manzo*, 53 Cal. 4th 880, 883 (2012) ("Statutory construction begins with the plain, commonsense meaning of the words in the statute, because it is generally the most reliable indicator of legislative intent and purpose." (citation and internal quotation marks omitted)). Of course, the State cannot seize items "indiscriminately." *Nunes v. Super. Ct.*, 100 Cal. App. 3d 915, 918 (1980). Thus, California law authorizes the State to seize only the funds that are actually the proceeds of the Celtic loan. But it is impossible to conclude that the funds seized in the [redacted] are the same property conveyed with the Celtic loan.

Accounting principles and basic logic prevent the State from proving that the funds seized in August 2018 were the same funds actually disbursed from the August 2017 Celtic loan—*i.e*, the "property that was stolen." As forensic accounting expert J. Duross O'Bryan explains, HCCA [redacted] in September 2017. O'Bryan Decl., ¶ 28. But over [redacted] was withdrawn from the account in the intervening period. *Id.* It is therefore impossible to conclude that any Celtic loan funds remained in the [redacted] when it was frozen almost a year later in August 2018. *Id.*

Indeed, accounting principles dictate that there are typically only two circumstances that permit the type of tracing the State would need to do to justify its seizure—but neither circumstance exists here. First, if the Celtic loan proceeds had been sequestered into their own account, then an accountant could conclude that money remaining in the account after a series of withdrawals was Celtic loan proceeds. O'Bryan Decl., ¶ 32. Second, if a contemporaneous

[12] Nor are the seized funds "evidence that tends to show a felony has been committed." *See* Cal. Penal Code § 1524(a)(4). In contrast to bank statements or physical currency seized from a defendant's person, for example, Dr. Benzeevi's bank accounts are not evidence. *See United States v. $448,342.85*, 969 F.2d 474, 476 (7th Cir. 1992) ("[A]n account is not even a tangible object[.]")

ledger had been maintained that attributed deposits and withdrawals within the account to particular funding sources, a tracing would be possible. *Id.* Here, as neither circumstance exists, the State cannot conclude that the funds remaining in Dr. Benzeevi's account as of August 2018 were Celtic loan proceeds.[15] *Id.* The seized money therefore is not "property [that] was stolen," *see* Cal. Penal Code § 1524, so there was no "substantial basis" upon which to issue the warrant.

C. Because almost a year passed after the Celtic loan proceeds were transferred to HCCA, the Chase Warrant is based on "stale" information and lacks probable cause.

The passage of time between the receipt of the Celtic loans and the issuance of the search warrant compounds the problem. Quite simply, the search warrant is based on stale information. Generally, information is "stale," and therefore irrelevant to the probable-cause analysis, unless it "consists of 'facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.'" *Alexander v. Super. Ct.*, 9 Cal. 3d 387, 393 (1973) (quoting *Sgro v. United States*, 287 U.S. 206, 210 (1932)). When there is a delay of more than four weeks between the alleged criminal activity and the issuance of the warrant, courts in California "uniformly" consider the information stale and insufficient to show "probable cause [that] the material to be seized is still on the premises to be searched when the warrant is sought." *People v. Cooks*, 141 Cal. App. 3d 224, 298 (1983); *Hemler v. Super. Ct.*, 44 Cal. App. 3d 430, 433-34 (1975) (determining a warrant issued 34 days after the supposed criminal activity was not supported by probable cause). Here, the State waited more than eleven months after the Celtic loan proceeds were transferred to the [redacted] before obtaining this warrant—more than

[15] Notably, even if the State were to resort to accounting methodologies that are inapplicable to these circumstances, it still could not justify the seizure. For instance, using a "Last In, First Out" or "LIFO" methodology, one assumes that the last dollar deposited into an account is the first dollar spent. O'Bryan Decl., ¶ 32. A LIFO assumption leads to a conclusion that no Celtic loan money remained in Dr. Benzeevi's [redacted] when it was frozen in August 2018. *Id.* By contrast, a "First In, First Out" or "FIFO" methodology assumes that money is spent in the order it was deposited. *Id.* A FIFO assumption leads to a conclusion that approximately [redacted] in frozen funds were Celtic loan proceeds. *Id.* But here, there is no basis in accounting or logic to make a LIFO assumption, a FIFO assumption, or any other assumption about the order in which money was spent out of the account. *Id.* This is because the Celtic loan proceeds were combined with other funds and no contemporaneous ledger was maintained that might permit an after-the-fact attribution of particular withdrawals to particular funding sources. *Id.* Thus, here, even counterfactual assumptions in the State's favor would not justify the seizure.

eleven times the four-week shelf life outlined in *Hemler*—and numerous transactions took place in the interim. *See id.* Nor do these facts justify delay longer than four weeks. Nothing about the nature of the one-off Celtic loan transfer supports an inference that supposed criminal activity had "continu[ed] over a long period of time" or that would "continue until the time of the search." *See People v. Hulland*, 110 Cal. App. 4th 1646, 1652 (2003) (outlining exceptions to the four-week rule).

Moreover, California law does not authorize the State to seize Dr. Benzeevi's untainted assets prior to an indictment or complaint. California Penal Code § 186.11(d)(1)&(2) authorizes the State to seize and freeze funds only after a criminal complaint or indictment has been filed. No similar authorization exists for pre-indictment or pre-complaint seizure. *See Le Francois v. Goel*, 35 Cal. 4th 1094, 1105 (2005), *as modified* (June 10, 2005) ("The expression of some things in a statute necessarily means the exclusion of other things not expressed.") (citation and internal quotation marks omitted); *cf. United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994) (holding that the government is prohibited from seizing substitute assets prior to conviction because 21 U.S.C. § 853(e) allows restraint of only forfeitable assets but is silent as to substitute assets).

Thus, the State acted beyond its constitutional and statutory authority in seizing Dr. Benzeevi's [redacted].

D. Dr. Benzeevi is entitled to a hearing at which the State bears the burden of proving his property was appropriately seized.

Dr. Benzeevi is entitled to a hearing regarding the seizure of his bank accounts.[14] *See People v. Super. Ct. (McGraw)*, 100 Cal. App. 3d 154, 159 (1979) (entitling an owner of property to a "fair hearing" when the "contraband nature" of seized property is in doubt). At that hearing, Dr. Benzeevi should be presumed the rightful owner of the funds in the [redacted]. *See id.* (holding that the possessor of the seized property is presumed the owner of that property). The State bears the burden of proof to rebut Dr. Benzeevi's presumption of ownership and establish

[14] A hearing is also appropriate because the State's seizure of funds could deprive Dr. Benzeevi of his right to counsel. *See United States v. Unimex, Inc.*, 991 F.2d 546, 550 (9th Cir. 1993).

by a preponderance of the evidence that the bank funds were stolen. *See Ensoniq Corp. v. Super. Ct.*, 65 Cal. App. 4th 1537, 1549 (1998). If the State cannot satisfy its burden of establishing that all of Dr. Benzeevi's funds are stolen, the property must be returned to Dr. Benzeevi. *McGraw*, 100 Cal. App. 3d. at 160. "There is no discretion about it." *Stern v. Super. Ct. in & for Alameda Cty.*, 76 Cal. App. 2d 772, 784 (1946).

E. The seizure of funds infringes on Dr. Benzeevi's Sixth Amendment right to counsel of his choice.

The State's legally unjustified and imprudent seizure of Dr. Benzeevi's funds violates his Sixth Amendment right to defend himself and mandates the return of his property.

The Sixth Amendment guarantees Dr. Benzeevi the "fundamental" right to be represented by an attorney he can afford to hire. *Luis*, 136 S. Ct. at 1089 (plurality opinion). The State violated this constitutional safeguard by freezing Dr. Benzeevi's untainted property—*i.e.*, assets Dr. Benzeevi can "reasonably claim" are his "free and clear," *id.* at 1092 (plurality opinion).[15] The loss of nearly one million dollars inhibits Dr. Benzeevi's right to secure and pay counsel; indeed, the financial consequences of criminal conviction and defense are "steep." *See Luis*, 136 S. Ct. at 1094–95 (plurality opinion). This case is no exception—as the Court well knows, the State has executed numerous search warrants at numerous locations and has forced Dr. Benzeevi to hire lawyers to appear in this Court on numerous occasions to object to the breadth of the State's investigation. Cutting Dr. Benzeevi off from nearly one million dollars restricts his ability to mount a robust defense and unconstitutionally infringes on Dr. Benzeevi's Sixth Amendment rights. These funds should be released.

IV. CONCLUSION

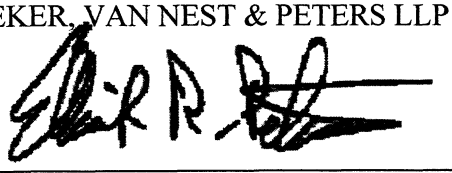
For the reasons stated above, this Court should grant Dr. Benzeevi's motion and order the immediate return of his seized funds and the release of his and HCCA's accounts.

[15] Although the State may have an interest in securing some illusory criminal forfeiture payment, those state interests do not "enjoy constitutional protection," and therefore must give way to Dr. Benzeevi's Sixth Amendment rights. *See Luis*, 136 S. Ct. at 1093 (plurality opinion).

Respectfully submitted,

Dated: September 20, 2018

KEKER, VAN NEST & PETERS LLP

By: 

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